# No. 10,665

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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A. T. MARTIN and ALICE M. MARTIN,
*Appellants,*

vs.

CHARLOTTE L. SHEELY, JOHN H. SHEELY, JOE A. SHEELY and ROSS L. SHEELY, co-partners,
*Appellees.*

**Upon Appeal from the District Court for the Territory of Alaska, Third Division.**

## BRIEF FOR APPELLEES.

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WARREN N. CUDDY,
GEORGE B. GRIGSBY,
Anchorage, Alaska,
*Attorneys for Appellees.*



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### JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE.

While not converting the jurisdictional statement and statement of the case of the appellants, the appellees quote and adopt as a part of this brief the opinion of the trial Court, which accompanied its decision, believing it to present more clearly the issues involved, the evidence adduced, and the law of the case, as follows:

"OPINION

This matter came on for hearing upon the amended complaint filed herein, in which com-

plaint it is alleged that the plaintiffs as co-partners were engaged in the dairy business; and that in connection with said business all the plaintiffs, except the plaintiff Ross L. Sheely, entered into a conditional sales agreement, a copy of which is attached to the complaint and marked Exhibit 'A', a lease, a copy of which is attached to the complaint and marked Exhibit 'B', and a grazing permit, which is also attached to the complaint and marked Exhibit 'C', that each of said instruments was and is an integral part of the transaction. That said sales agreement was for the purchase of the dairy, including the distributing system and all the equipment and cattle connected therewith, a list of which is attached to Exhibit 'A' attached to the complaint for a total purchase price of Twenty-eight Thousand Two Hundred Ninety-four Dollars ($28,294.00), $9800 of which was paid upon the execution of the agreement and $308.22 on the 10th of each and every month thereafter until the purchase price had been fully paid with interest at the rate of 6% per annum from July 1, 1941. That the chief item purchased under said sales agreement was 56 cows and that the defendants warranted that they were the lawful owners of said cows and had full right, power and authority to sell the same. That the plaintiffs aforesaid, relying upon said warranty and representations, entered into said sales agreement, the lease and the grazing permit, and made the original payment under said sales agreement, paid $200 on account of said lease and $110 on account of said grazing permit and entered into possession of said property on July 1, 1941. That the performance of said conditional sales agreement, lease and grazing permit was guaranteed in writ-

ing by the plaintiff Ross L. Sheely, a copy of which writing is attached to the complaint and marked Exhibit 'D'. That the plaintiffs have performed all the conditions of said agreement, lease and grazing permit to the date of the commencement of this action, and in addition to the initial payment above set forth have paid the sum of $1541.10 and $450 interest on the sales agreement, the sum of $1000 on the lease, and have paid certain sums in connection with a truck, $2000 for hay and grain and have purchased equipment and made improvements on the premises at the cost of $2513. That at the time of the execution of the above instruments, a large number of the cows sold to the plaintiffs were diseased and infected with Bang's disease or contagious abortion, which fact was well known to the defendants and unknown to the plaintiffs, and that the defendants sold and delivered said cows to the plaintiffs with an intent to injure the plaintiffs. That the plaintiffs purchased the cattle for a dairy herd and that said herd was of little value for dairy purposes in the condition in which it was sold. That the plaintiffs have suffered damages in the sum of $15,000. And plaintiffs pray first, that the conditional sales agreement, Exhibit 'A' attached to the complaint, be declared illegal and void, second, that the lease Exhibit 'B' attached to the complaint, the grazing permit, Exhibit 'C' attached to the complaint, also be declared void as a part of the same transaction and that the plaintiffs have judgment against the defendants in the sum of $15,000, and for other equitable relief, costs and an injunction.

The defendants in this case have answered the original complaint, and it was stipulated in open

court that said answer might be considered as an answer to the amended complaint and that defendants might if they should desire plead an estoppel. The defendants by their answer deny that there was any segregation of value for the cows or any other item embodied in said conditional sales agreement. Defendants deny that plaintiffs in making said agreement relied upon the representations of the defendants. Deny that the guaranty agreement of Ross L. Sheely was made at the insistence of the defendants and allege that the transfer of the business from the defendants to the plaintiffs was proposed by the said Ross L. Sheely because he did not wish to appear directly as a purchaser. Defendants deny that the plaintiffs have performed the conditions prescribed in the conditional sales agreement, lease and grazing permit to the date herein. Defendants deny that the plaintiffs have purchased additional equipment and made improvements to the sum of $2513 or any other sum. And, the defendants allege that the plaintiffs did not make the payments specifically to be made by condition of the said conditional sales agreement subsequent to the month of December, 1941, and were and are in default by reason of said non-payments. The defendants deny that at the time of the execution of the sales agreement and for a long time prior thereto a large number of the cows sold to the plaintiffs were infected with Bang's disease or contagious abortion and that this fact was well known to the defendants and unknown to the plaintiffs and deny that they were sold to the plaintiffs with an intent to injure the plaintiffs. The defendants admit that the plaintiffs have killed and disposed of the cows mentioned in the

complaint, but deny that the same were killed or disposed of by necessity and because of said disease. Defendants deny that said herd was infected and deny that said herd was of little value for dairy purposes. Defendants deny that the plaintiffs have suffered damage by any acts or omissions of the defendants, deny that the plaintiffs will suffer irreparable damages if required to perform the agreements, deny that the plaintiffs have no remedy at law and deny that the plaintiffs have suffered damage in the sum of $10,000 or any other sum.

And by way of first counterclaim and first cross-complaint, the defendants allege that the parties entered into the conditional sales agreement, marked Exhibit 'A' attached to the complaint, that the plaintiffs complied with the said agreement during the year 1941, that said agreement was guaranteed by the plaintiff Ross L. Sheely, in writing, Exhibit 'D' attached to the complaint, that the plaintiffs have defaulted on said agreement, that the defendants declare the balance due on said agreement and that is $16,952.90 together with interest at the rate of 6% per annum from December 10th, 1941.

And for second counterclaim and second cross-complaint the defendants allege the execution of the lease agreement, Exhibit 'B' attached to the complaint, that the plaintiff Ross L. Sheely guaranteed the payments therein in writing, Exhibit 'D' attached to the complaint, and that no payments have been made since January, 1942, that the plaintiffs have defaulted and that there is $2000 together with interest at the rate of 6% per annum on each monthly payment of $200 due

and owing thereon and that the defendants are entitled to the immediate possession of the leased premises.

And for a third counterclaim and third cross-complaint, it is alleged that the parties entered into the grazing permit, Exhibit 'C' attached to the complaint; that the sum of $110 was due the defendants on said permit on the 19th day of August, 1942, and that plaintiffs have failed to make said payment and that the defendants are entitled to the immediate possession of the premises described therein. Whereupon, the defendants pray that the plaintiffs' complaint be dismissed, that they have judgment on their first counterclaim in the sum of $16,952.90 together with interest; that they have judgment on their second counterclaim in the sum of $2000, together with interest; and that the defendants have judgment for immediate possession of the premises and property mentioned in defendants' third counterclaim and for costs.

By reply, the plaintiffs state that during all the times in the pleadings referred to plaintiffs were co-partners; that the contracts set forth, Exhibits 'A', 'B', and 'C' attached to the complaint were entered into by the parties thereto for and in behalf of all the plaintiffs. And, replying to the affirmative defenses in addition to certain allegatons previously made, state that the chief item contained in the property purchased under Exhibit 'A' attached to the complaint, was 56 head of cows which were figured at $300 per head; the plaintiffs repeat the allegations as to the sums of money paid; allege that the cattle were diseased and infected and make the same allegations as to the defendants' second and third counterclaims.

This cause came on for hearing before a jury on Monday, the 21st day of December, 1942, at which time evidence was offered by the plaintiffs to the effect that the herd of cattle owned by the defendants was examined in April, 1941, by Earl F. Graves, a veterinarian employed by the Territory of Alaska for the purpose of testing cattle for Bang's disease and other diseases; that on the 22nd day of April such examination was made at which time there were 21 cattle of said herd definitely infected with Bang's disease and 8 were suspects; that after making said tests the said veterinarian notified the defendant A. T. Martin of the result of said tests, made re-tests in the presence of said Martin and thereafter fully informed the said A. T. Martin of the condition of his herd; at which time the said Graves gave said Martin a copy of his report, marked Plaintiffs' Exhibit 'A' in this cause. That in June, 1941, negotiations were entered into between the plaintiffs and the defendants which resulted in the agreements being entered into, Plaintiffs' Exhibits 'A', 'B', 'C' and 'D' attached to the complaint herein. That the payments alleged to have been made in the complaint were thereupon made and the plaintiffs went into possession of said herd. That prior to the execution of said agreement the defendant A. T. Martin claims that while the plaintiff Ross L. Sheely was at the premises transferred he informed him that there was some Bang's disease in the herd, this is denied by the plaintiff Sheely. That in connection with the execution of the conditional sales agreement, Plaintiffs' Exhibit 'A' attached to the complaint and while discussing the clause under which defendants claim they sold this herd without any warranties what-

soever, the plaintiff Sheely testified that the following conversation was had:

Mr. Donohoe. Do you recall in my office, you being present, your family being present, Mr. Martin being present, Mr. Cuddy being present and myself, discussing the clause in the contract of no warranties and there was a discussion regarding to your having inspected the cows, knowing their condition and that there was no guarantee on it?

Mr. Sheely. Yes.

Mr. Donohoe. There was such a discussion at the time?

Mr. Sheely. May I say what the discussion was?

Mr. Donohoe. Yes.

Mr. Sheely. We were in your office, Mr. Donohoe, I was there and Mrs. Sheely, Jack was there, Joe was there, Mr. and Mrs. Martin were there, yourself and Mr. Cuddy. Mr. Cuddy said what about Bang's disease. Mr. Martin said I don't know anything about it, but he did know about it. He knew it was against the law to sell diseased cows. All he said was there was no warranty in the contract.

Mr. Donohoe. Didn't Mr. Martin tell you it was impossible to determine whether or not there was Bang's disease in these cows?

Mr. Sheely. He said there was no warranty as to the health of the cows. He did not tell me whether it was possible to determine whether they had Bang's disease.

Nowhere in the evidence is it claimed that the defendant made full disclosures of the condition of the herd. That sometime after the herd was

delivered to the plaintiffs one of the cows of the said herd aborted, but that the plaintiffs paid little attention to the same for the reason that it is not infrequent that abortions occur. That thereafter and sometime in September, while the plaintiffs had taken some of the purchased cows to their ranch at Palmer, they were informed by the Health Department that a restriction had been put on said herd on account of Bang's disease and that plaintiffs were not allowed to move said cattle. That during the fall of 1941 several more of the cows aborted; that the plaintiffs made improvements on the premises as shown by Plaintiffs' Exhibit 'D'; that the plaintiffs slaughtered several of the cattle; that thereafter and in January, 1942, the witness Graves made another examination of the herd at which time he found that 32 of the remaining herd were infected with Bang's disease, 8 were clean and the balance were suspects. That thereupon the plaintiffs brought this action.

The evidence shows that of the original herd purchased 36 were slaughtered and sold for beef for which the plaintiffs derived $4472.20, six died and that there are 14 cows and one bull left of the original herd. That the plaintiffs brought 13 cows and one bull from Palmer which are now on the premises, that 8 or 9 of these cattle were brought from Palmer before the plaintiffs had full knowledge as to the diseased condition of this herd, but plaintiffs had some knowledge thereof and that the balance were brought to the premises from Palmer after the plaintiffs were fully informed of the diseased condition of the herd. That the plaintiffs paid the defendants under Exhibit 'A'

attached to the complaint the sums of $9800, $1541.10 and $450 interest; that the plaintiffs paid the defendnats under Exhibit 'B' attached to the complaint the sum of $1200, and the sum of $110 under Exhibit 'C' attached to the complaint; that the plaintiffs paid to the defendants either directly or indirectly for feed the sum of $2000, and have paid for improvements the various items stated in Plaintiffs' Exhibit 'D' only part of which has been delivered. The evidence also shows that the plaintiffs have paid defendants an indefinite amount in connection with the purchase of trucks but since these trucks were afterwards disposed of by the plaintiffs this amount becomes immaterial. The plaintiff Ross L. Sheely testified that the reasonable rental value of the premises under the circumstances was $50 per month. The plaintiffs stipulated that their complaint and the defendants that their counterclaims are in equity. Whereupon, the Court dismissed the jury.

Chapter 55, *Alaska Session Laws,* 1919, provides as follows:

'Section 1. To import or to bring, into the Territory of Alaska, animals of whatsoever kind or character, diseased or infected with the diseases mentioned in Section 3 of this Act, is hereby declared to be injurious to the public health, against public policy, illegal, and punishable as herein provided.

Section 2. To own, have in one's possession, sell, transfer, transport, drive or convey from one section of the Territory to another, animals or livestock of whatsoever kind or character, diseased or infected with the diseases mentioned in Section 3 of this Act, is hereby declared to

be injurious to the public health, against public policy, illegal, and punishable as herein provided.

Section 3. It shall be unlawful to bring, into the Territory of Alaska, any horses, cattle, or swine, for work, feeding, breeding or dairy purposes, without first having such animals examined and found free from the following contagious diseases: glanders, farcy, tuberculosis, actinomycosis, rinderpest, foot and mouth disease, contagious abortion, contagious keratitis, scabies, maladie du coit, swine plague and hog cholera, * * *

Section 4. For each evasion or violation of any provision of the three sections last preceding, the shipper or party responsible for the evasion or violation, shall be fined not more than Five Hundred Dollars ($500.00); * * *'

6 *R. C. L., Contracts,* p. 701, Sec. 107:

'Express or Implied Prohibition.—A contract directly and explicitly prohibited by a constitutional statute in unmistakable language is absolutely void. That has never been judicially doubted, and is unanimously conceded. To hold such a contract binding would be to enforce that which the legislature has forbidden, to give effect to that which the legislature has declared void,—the repeal of a law by judicial construction. However, it is not necessary that there should be an express prohibition in a statute to render void a contract made in violation of it.

108. Implication from Imposition of Penalty.—In order that there may be an implied prohibition the imposition of a penalty is not essential.

In other words, it is not necessary that a statute should impose a penalty for doing or omitting to do something in order to make void a contract which is opposed to its operation. The obverse of this proposition is, however, the basis of a well established rule, which dates at least from the time of Lord Holt. The rule, as stated in the early decisions, is that every contract made by or about a matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition though there are no prohibitory words in the statute. Although it might perhaps not warrant the conclusion that a penalty implies a prohibition for the purpose of making the offense punishable by indictment in case the law had prescribed another and a specific punishment for the offense, Lord Holt's remark is an authority for the proposition that a contract made in direct violation of a statute providing a penalty for the violation thereof is illegal though the contract is not in express terms prohibited or pronounced void.'

*Restatement of the Law, Contracts,* p. 1109:

'Topic 12. Effect of Illegality. Sec. 598. Generally No Remedy on an Illegal Bargain. A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value, except as stated in Secs. 599-609.

Comments:

a. The statement that all illegal bargains are void is not wholly accurate. It is true that many such bargains are entirely without effect on the legal relations of the parties and that a court will only under very exceptional circumstances enforce specifically an illegal agreement, but the rule of public policy that forbids an action for damages for breach of such an agreement is not based on the impropriety of compelling the defendant to pay the damages. That in itself would generally be a desirable thing. When relief is denied it is because the plaintiff is a wrongdoer, and to such a person the law denies relief. Courts do not wish to aid a man who founds his cause of action upon his own immoral or illegal act. If from the plaintiff's own statement or otherwise it appears that the bargain forming the basis of the action is opposed to public policy or transgresses statutory prohibitions, the courts ordinarily give him no assistance. The court's refusal is not for the sake of the defendant, but because it will not aid such a plaintiff. So if the plaintiff and defendant changed sides, and the defendant, equally in fault, was to bring his action against the plaintiff, the latter would then have the advantage; for where both are equally in fault the position of the defendant is the stronger.

b. To deny such persons recovery, though an equally guilty defendant thereby escapes punishment, tends to diminish the number of illegal agreements. But not all illegal agreements are for that reason void. A rule to that effect would have unfortunate consequences, since in many

cases it would protect a guilty defendant from paying damages to an innocent plaintiff, or would otherwise produce undesirable results. Cases of this sort are covered by the rules stated in Secs. 599.608. Doubtless a statute can and sometimes does make a bargain absolutely void, but even though a statute so states in terms, "void" sometimes means voidable, and unless no other conclusion is possible from the words of a statute, or from the policy on which a statute is based, it should not be held to make all agreements contravening it wholly void.

c. The rule stated in the Section precludes recovery on principles of quasi-contract for benefits conferred under an illegal bargain, as well as an action on the bargain itself.

Sec. 599. Ignorance of Facts Rendering Bargain Illegal. Where the illegality of a bargain is due to

(a) facts of which one party is justifiably ignorant and the other party is not, or

(b) statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law

the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant or for losses incurred or gains prevented by non-performance of the bargain.'

*Restatement of the Law, Restitution,* p. 595:

'Sec. 149. * * * Actions for restitution have for their primary purpose taking from the defendant and restoring to the plaintiff something to which the plaintiff is entitled, or if this is not done, causing the defendant to pay the plaintiff an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit. If the value of what was received and what was lost were always equal, there would be no substantial problem as to the amount of recovery, since actions of restitution are not punitive. In fact, however, the plaintiff frequently has lost more than the defendant has gained, and sometimes the defendant has gained more than the plaintiff has lost.

In such cases the measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution. If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient benefited. If he was consciously tortious in acquiring the benefit, he is also deprived of any profit derived from his subsequent dealing with it. If he was no more at fault than the claimant, he is not required to pay for losses in excess of benefit received by him and he is permitted to retain gains which result from his dealing with the property. There are situations not falling within the above categories as to which, while they are subject to the

general equitable principle that restitution is granted to the extent and only to the extent that justice between the parties requires, it is not feasible to make specific statements (see the Caveat to Sec. 155).'

Under the law and the evidence above cited, there can be no question but what the contracts involved in this case are illegal and should be declared so. This disposes of the defendants' counterclaims because there can be no breach of these illegal contracts for which the defendants can recover. Under the evidence the Court must find that the defendants had full knowledge of the facts making this contract illegal, and further that the defendants did not make full disclosure of said facts before entering into this contract. There was some talk of Bang's disease when the parties were about to enter into these contracts, at which time the clause of the contract relieving the defendants from warranties was discussed. And, the defendant A. T. Martin claims that he discussed the matter with the plaintiff Ross L. Sheely, which the plaintiff Ross L. Sheely denies, but at no time does said defendant or either of them claim to have made full disclosures. This, taken in connection with the allegations of the answer herein, wherein the defendants specifically deny that they had knowledge of the fact that the herd was infected with Bang's disease previous to entering into the contract, leaves the Court to find that the defendants purposely and deliberately kept these facts from the plaintiff, and that, therefore, the plaintiffs were ignorant of the facts which made the contracts illegal, and for that reason are entitled to recover the moneys paid under the contracts since the Court finds that these

contracts although executed separately are all part of the illegal transaction. Therefore, the Court finds that the plaintiffs should recover from the defendants the sum of $9800, $1541.10 and $450 interest, moneys paid under the contract Exhibit 'A' attached to the complaint, $1200, moneys paid under Exhibit 'B' attached to the complaint, $110 paid under Exhibit 'C' attached to the complaint, $1766.85 paid under Exhibit 'D' attached to the complaint, which is the full amount delivered under said exhibit, but does not include supplies on order, which are the plaintiffs and which the plaintiffs are allowed to divert and dispose of in whatever manner they see fit, except that the Court excludes from the items set up in that exhibit, $32.50 paid for supplies, milk cases, etc., $110.90 paid for quart bottles, and $80 paid for one-half pint bottles, for the reason that it is not shown by the evidence that these supplies purchased in connection with the running of said business are in excess of the inventory attached to the complaint. The Court also deducts 50% of the three items mentioned in said exhibit, milk pump motor—$17.50, separator motor—$40 and a Crepaco electric motor for milk pump—$17.50, and the amount paid for painting the milk room—$6.00, making a total of $14,867.95 with interest on the various amounts from the time they were incurred, less $4472.20, which the plaintiffs received for the slaughtered cattle, and since the dates this sum was received does not appear in the record no interest can be allowed on same.

The Court disallows the plaintiffs the claim for $2000 for hay purchased at the time the original contracts 'A', 'B' and 'C' attached to the complaint were entered into or shortly thereafter, be-

cause the Court finds that said transaction was collaterally connected with the illegal bargain only.

*Restatement of the Law, Contracts,* p. 1108:

> 'Sec. 597. Bargain Connected Collaterally With Illegality. A bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction.'

The Court finds that the cattle delivered by the defendants to the plaintiffs are accounted for by the cattle still remaining on hand, those slaughtered and those that have died, and that therefore the cattle delivered have been fully accounted for. The Court finds that the plaintiffs brought certain cattle to the premises of which the plaintiffs took possession at the time the illegal contracts were executed, that these cattle are still the cattle of the plaintiffs to be disposed of as the plaintiffs see fit, either by slaughtering or removing them if that is possible. The Court feels that under the evidence in this case, part of said cattle were brought to the premises after the plaintiffs had full knowledge of the facts and clearly the plaintiffs would not be entitled to recover from the defendants for such cattle; that part of the remaining cattle were brought there when the plaintiffs had considerable knowledge of the facts and would be required to investigate further before bringing cattle there for which they could hold the defendants liable. The first of these cattle were, however, brought there when the plaintiffs had no knowledge or very little knowledge of said disease. If the Court made the defendants pay

$300 apiece for these cattle as it is contended for by the plaintiffs, the Court would in fact be making and enforcing an illegal transaction. Under the circumstances, the Court is going to offset whatever the plaintiffs were entitled to under said claim against whatever claim the defendants may be entitled to for rent of the premises, which right seems very doubtful to the Court because the rent is part of and closely connected with the illegal contracts.

It will be noted that the plaintiffs under the above opinion will recover less than they would be able to retain if the Court had found that the parties were in pari delicto as well as particeps criminis and left them where they placed themselves, without giving aid to either party. If this had been done the plaintiffs would have been entitled to retain $12,000 worth of personal property, the $4472.20 obtained for the cattle that were slaughtered and the cattle on the ranch. The plaintiffs, however, will have the satisfaction of knowing that what they have obtained in this case was by virtue of the principles of equity and good conscience and not merely by being in an advantageous position under an illegal contract in which they were in pari delicto.

The plaintiffs may prepare findings of fact, conclusions of law, and a decree in accordance with this opinion.

Dated at Anchorage, Alaska, this 30th day of December, 1942.

Simon Hellenthal,
District Judge."

## ARGUMENT.

### CONSTITUTIONALITY OF ACT.

Appellants contend that Section 2 of Chapter 55, Session Laws of Alaska, 1919, is unconstitutional and void as being in conflict with the Organic Act of Alaska which provides:

> "No law shall embrace more than one subject, which shall be expressed in its title."

The title to the Act in question and Section 2 thereof are set forth in full on page 19 of appellants' brief:

The constitutional provision under discussion is a provision common to the constitutions of most if not all of the states. In all text books on the question, the object and purpose of such provisions is first discussed. Following this precedent we submit the following:

> "The purposes of these constitutional provisions have been summarized as follows:
>
> (1) To prevent 'log-rolling' legislation.
>
> (2) To prevent surprise, or fraud, in the legislature by means of provisions in bills of which the title gives no intimation.
>
> (3) To apprise the people of the subject of legislation under consideration."

Citing

> Ruling Case Law, Vol. 25, Sec. 83, Cooley's Constitutional Limitations.
>
> "These provisions are intended to prevent the evils of 'omnibus bills', and surreptitious legislation."

"Log-rolling" is an expression of such well known significance as to probably not require definition. It is sufficient to cite the following from the Juneau Empire of September 8, 1942:

> "Q. What does the political term 'log-rolling' mean?
>
> A. When congressmen get other members to vote for something beneficial to their own districts, in exchange for similar courtesies."

It is evident that the constitutional provision in question has none of the ear-marks of surreptitious, log-rolling or fraudulent legislation. So that the objections of defendant to the Act become, at least, technical.

Attention having been called to the evils, to remedy which the constitutional provision has been adopted, it is next in order to discuss the consequent rules of construction of such statutes, which the authorities unanimously approve.

> "THE PROVISIONS OF THE VARIOUS CONSTITUTIONS RELATING TO the subject-matter and titles of acts should be construed liberally to uphold proper legislation, all parts of which are reasonably germane, on the one hand, and to prevent trickery on the other hand. The restriction requiring the subject of an act to be expressed in its title should be reasonably construed, considering substance rather than form, to require the expression in the title of the general object *but not the details or incidents, or means of effecting the object sought.*"
>
> 16 *Cyc.*, page 1017.

"CANONS OF CONSTRUCTION have been adopted which may be summarized as follows: *That every law is presumed to be valid;* that this provision of the constitution is to be liberally construed and *all doubts resolved in favor of the law;* that the title should also be liberally construed giving to its general words paramount weight; that it is not essential that the best or even accurate words in the title be employed, but the remedy to be secured and mischief avoided furnish the best test of its sufficiency to prevent such title from being made a cloak or artifice to distract attention from the substance of the act, *provided the title be fairly suggestive,* and not foreign to the purpose of the statute."

*State v. State Institutions Board of Control,* 88 N.W. 533.

In *Blair v. Chicago,* Justice Day speaking for the Court says:

"The Illinois cases were reviewed and the conclusion reached that the purpose of the constitutional provision is reached if the title is comprehensive enough as reasonably to include within the general subject or the *subordinate branches thereof,* the several objects which the statute seeks to effect. And it was held that generality of the title is no objection to a law so long as it is not made to cover legislation incongruous in itself, and which by no fair intendment can be included as having necessary or proper connection. * * * The Montclair Twp. Case held I. That this provision does not require the title to the act to set forth a detailed statement or an index or abstract of its contents; nor does it prevent uniting in the

same act numerous provisions having one general object, fairly indicated by its title. * * * Now, the object may be very comprehensive and still be without objection, and the one before us is of that character, but it is by no means essential that every end and means necessary or convenient for the accomplishment of the general object should be either referred to or *necessarily indicated by the title.*"

*Blair v. Chicago,* 201 U.S. 452.

"The history and object of this constitutional provision, and the mischief against which it was aimed, should be kept steadily in view by the courts in its construction and application. It was intended to prevent the practice common in legislative bodies not thus restricted of embracing in the bill matters having no relation to each other, wholly incongruous, and of which the title gives no notice, thus securing the adoption of measures by fraud, and without attracting attention, or combining subjects representing diverse interests, in order to unite the members who favored either in support of all. These combinations, being corruptive of the legislature and dangerous to the state, are prohibited in most if not all the states by constitutional provisions. This provision of the constitution was not designed to embarrass legislation, but to put an end to legislation of the vicious character referred to, and has been always liberally construed to sustain legislation not within the mischief. * * * A disregard of the constitutional provision will be fatal, but the departure must be plain and manifest, and *all doubts will be resolved in favor of the law.*

The conflict between the constitution and the law should be palpable and clear before the courts should disregard a legislative enactment upon the sole ground that it embraces more than one subject. (Sutherland St. & Const. Law Sec. 82.)

If all the provisions of the law relate directly *or indirectly* to the same subject, are naturally connected and are not foreign to the subject expressed in the title, they will not be held unconstitutional as in violation of this clause of the constitution."

*State v. Shaw,* 29 Pac. 1028 (Ore.), citing:
*O'Keefe v. Weber,* 14 Ore. 55;
*Bowan v. Cockril,* 6 Kan. 311;
*Gillitt v. McCarthy,* 25 N.W. 637.

"An act, no matter how comprehensive, would be valid provided a single main purpose was held in view, and nothing embraced in the act except what was naturally connected with and incidental to that purpose."

*Van Horn v. State.*

"Penal provisions are not repugnant to the constitutional provisions."

36 *Cyc.,* page 1023.

In conclusion, under this head, the object or purpose of the Act is the eradication of diseased cattle now in the Territory of Alaska. Section 2 of the Act provides one of the means to that end. It is germane to the subject and object. The title is "suggestive of" and not foreign to the purpose of the statute.

After a voluminous argument and citation of authorities to support the contention that the Act in question is illegal, appellants advanced the proposition (page 29 (b) appellants' brief) that the Court write into the statute the words:

"After inspection and quarantine or destruction ordered" so as to make it read,

> "*After inspection and quarantine or destruction ordered,* to own, have in one's possession, sell, transport, drive * * * animals or livestock * * * diseased or infected is declared hereby to be injurious to the public health, against public policy, illegal and punishable, as hereinafter provided."

In other words the gist of the offense is "getting caught", which is a popular idea among certain classes. No matter how purposely, nor with what evasive methods, nor with what guilty knowledge the law might be violated, it is contended that no crime has been committed, until after inspection etc. ordered, and a subsequent defiance of the law.

Appellants contend that the necessary provisions of the Act in question regarding the disposition, quarantine or destruction of diseased cattle and other regulations, common to all such legislation, qualify and virtually nullify the plain provision of the law prohibiting and illegalizing the sale of diseased cattle. Such a construction would necessarily defeat the purpose of the Act. The aforesaid provisions for the disposition of diseased animals by destruction or quarantine stand by themselves and are not to be

construed as legalizing contracts of sale or repealing penal provisions.

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**THE CONTRACT OF SALE WAS ILLEGAL AND VOID.**

There are three principles of law which affect the rights to the parties to this action, and which are established unanimously by the authorities.

*First:* A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law cannot at the same time prohibit a contract and enforce it.

*McManus v. Fulton,* 67 A.L.R. 696.

A contract directly and explicitly prohibited by a constitutional statute in unmistakable terms is absolutely void. That has never been judicially doubted and is unanimously conceded.

6 *Ruling Case Law,* 701.

*Second:* It is also well established that money paid on a void contract made in violation of statutory provision where the parties are *in pari delicto,* and *particeps criminis,* cannot be recovered; that the law will not lend its aid to either party, but will leave them where they have placed themselves.

The above principle is conceded by the plaintiffs and needs no authority.

*Third:* The converse of the second principle above stated is also true. Equity will lend relief where

parties to an illegal contract are not *in pari delicto,* and aid the one comparatively more innocent.

*Marshall v. Lovell,* 19 F. (2d) 751, and certiorari in 276 U.S. 616.

The overwhelming evidence in this case is that the parties are not *in pari delicto;* that the defendants well knew the condition of the cattle sold to the plaintiffs at the time of said sale, and deliberately concealed their condition as to their being inflicted with contagious abortion, and failed to disclose to plaintiffs the report on tests of said cattle made by the Territorial Veterinarian.

The most extreme view of the testimony against the plaintiffs only shows grounds for a suspicion on their part of the existence of contagious abortion in the cattle purchased, while the undisputed evidence shows that the defendants knew they were infected. In this respect the case at bar is on all fours with the case of

*Groves v. Jones,* reported in the 233rd N.W. page 375 (a contagious abortion case).

In that case the only evidence produced to show the diseased condition of the cattle was the test report which was introduced by the defendant, and therefore held binding on him. In the case at bar the test reports were introduced by the plaintiffs, but the Territorial Veterinarian himself was on the witness stand and gave direct evidence of the blood tests and condition of the cattle.

The last case above cited also establishes the right of plaintiffs to recover back that part of the purchase price paid, citing 6 *Ruling Case Law,* page 833, as follows:

> "A distinction has been made between those illegal contracts, both parties to which are equally culpable and those in which, although both have participated in the illegal act, the guilt rests chiefly on one. Unless therefore, the parties are *in pari delicto* as well as *particeps criminis,* the courts, although the contract is illegal, will afford relief where equity requires it to the more innocent party even after the contract has been executed."

See also,

*Skinn v. Reutter,* 97 N.W. 152,

in which the purchaser of diseased hogs, who placed them with his own hogs, causing their death, was entitled to recover the purchase price of the hogs purchased, together with the value of his own hogs.

Also,

> "when seller knows of the presence of the disease, he is liable for all direct and consequential damages resulting therefrom, if he fraudulently fails to communicate his knowledge to purchaser."
>
> *Cheeseman v. Felt,* 142 Pac. 285.

Appellants throughout their brief, as in fact was the case throughout the trial, stress paragraph six of the Conditional Sales Agreement, as barring recovery by plaintiffs. The paragraph is as follows:

> It is understood and expressly agreed that the buyers have inspected the property covered by this agreement and are familiar with the condition thereof, and that the same is sold to the buyers without any warranties or representations of any kind or character whatsoever on the part of the sellers, save and except that the sellers warrant and agree that they are the lawful owners thereof and have full right, power and authority to sell and dispose of the same and that there are no existing liens or encumbrances against said property or any part or portion thereof.

Appellants ignore the principle of law unanimously conceded by all authorities that:

> A party to an illegal contract cannot, either at the time of the execution of the contract or afterward, waive his right to set up the defense of illegality in any action thereon by the other party.
>
> 13 *Corpus Juris,* Section 451 and cases cited.

> "The defect cannot be gotten rid of either by failure to plead it, or by agreement to waive it in the most solemn manner. The law will not enforce contracts founded in its violation."
>
> *Levy v. Davis,* 80 L. Ed. 791.

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**THE PARTIES WERE NOT IN PARI DELICTO.**

There is overwhelming evidence to sustain the finding of the trial Court that the parties were not *in pari delicto.* It is true that in the testimony of Martin,

appellant (R. 138-139), there is the positive statement that Martin told Sheely, appellee, with reference to Bang's Disease, "that some were reactors according to the veterinarian." An extract from this testimony (R. 138)is as follows:

> "I told him some were reactors according to the veterinarian. Graves was the veterinarian. He didn't ask me to show it to him. Just he and I were there. No one else was there. No, he didn't ask me to tell him the gist of it. No, I didn't tell him I had the report. I had a copy. No, he didn't ask to see it."

From the above extract it might be inferred that Martin testified that he told Sheely that he had a copy of the veterinarian's report showing Bang's Disease in the herd and that Sheely negligently failed to ask to see it, this from the words:

> "No, I didn't tell him I had the report. I had a copy."

This is an illustration of how a condensation into narrative form can be misleading, if not carefully checked, as was the case in this instance.

Therefore, with apologies to the Court, and as by way of illustration, we go outside the record and insert an extract from the cross-examination of Martin, as follows:

> "By Mr. Grigsby:
>
> Q. When did you say you had this conversation with Mr. Sheely?

A. It was previous to the time of the sale of the herd, when he was inspecting the place.

Q. How long before?

A. Only a few days before the purchase.

Q. The conversation in which he talked about Bang's disease?

A. A very few days before.

Q. You told him you didn't know whether or not they were infected?

A. I told him some were according to the veterinarian's were re-actors.

Q. Which veterinarian?

A. Graves.

Q. Did you show it to him?

A. He didn't ask for it.

Q. Who was there?

A. Just he and I.

Q. No one else there?

A. No, Sir.

Q. Did you tell him the gist of it?

A. No, he didn't ask it.

Q. You told him you had the report?

A. No.

Q. You had a copy?

A. Yes.

Q. He didn't ask to see it?

A. No.

Q. He didn't ask how many were infected or any details at all?

A. No, Sir."

Also, Martin testified (R. 137):

"I did have a conversation with Mr. Sheely prior to his purchase of the place with reference to Bang's Disease. * * * Mr. Sheely asked me out behind the barn. I said I couldn't say the

exact status. I said some was shown a year and a half ago and I had butchered some reactors since then and couldn't state the present status."

*Not a word about any veterinarian's report.*

This conversation was a few days before the purchase, which was June 26, 1941, and Graves, the Territorial Veterinarian testified:

"On April 22, 1941, I examined the herd of Mr. Martin—no tuberculosis re-actors; I did find 21 contagious abortion and 8 suspect re-actors and the rest were clean. * * * Mr. Morley of the Territorial Board of Health and Mr. Martin and myself were present at the time of the examination. * * * I ran the bloods down in the hotel. * * * I found so many re-actors that I thought Martin should see some of them run. Morley had Martin come up, and I ran a portion of the blood samples so Martin could see how we were reading —how it was done—we ran just some of the worst re-actors. * * * I gave Martin a copy of the original report."

Yet, two months after this examination, at which he, Martin, was personally present, which showed that over half his herd was contaminated, he sloughs this dying dairy business onto Sheely for the purchase price of $28,294.00; $9800.00 cash, the balance on monthly payments of $308.22, which Sheely continued to pay up to and for the month of December, besides paying the rental for the lease and grazing permit; and not a word about this examination, not a word about this blood test, even according to his own testimony, was told by Martin to Sheely.

We cite again, *Groves v. Jones,* a contagious abortion case, in which the facts were remarkably similar to the facts here, and in which the Court said:

> "The plaintiff was the innocent victim of defendant's fraud. Taking the most extreme view of the testimony against him, it shows only a suspicion on his part while the undisputed evidence shows that the defendant knew they were infected. Clearly they were not in pari-delicto or particeps criminis."

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THE CONTRACT WAS ENTIRE.

Appellant cites *Hermanos v. Matos,* 81 Fed. (2d) 930, arising in Puerto Rico. That case is in point in one respect only, in that it holds that on a sale of a herd of cattle, some of which were diseased, the sale was void or voidable, only as to those cattle which were diseased, but valid as to the remainder. But as constantly urged by appellants, the appellees' purchase was of a dairy business, a going concern. (Appellants' Brief, pages 33-34, and R. 10.) True, the amended complaint alleges (R. 47, Par. V):

> "that the chief item contained in the inventory of property attached to the conditional sales agreement, 'Exhibit A', was fifty-six head of cows; that said cows were figured by the parties at three hundred dollars ($300.00) per head, which accounted for $16,800.00 of the total purchase price of $28,294.00 * * *".

Appellants' answer (R. 31) admits this allegation except "that defendants deny that there was any

segregation of value for the cows or any other item embodied in said conditional sales contract, Exhibit A".

Appellees did not by the allegation intend to allege that "there was any segregation of the value for the cows", and does not now so allege.

Appellees alleged that "the chief item contained in the inventory was 56 head of cows; that said cows were figured by the parties at ($300.00 per head.") The plaintiff, Sheely, sustained this allegation by his testimony (R. 116) and was not contradicted by any testimony of the defense.

So that, it stands uncontradicted that the cows were the chief item in the inventory of property sold by defendants to plaintiff, and accounted for $16,800.00 of the total purchase price of $28,294.00.

Furthermore, it is alleged in the complaint (R. 46, Par. III) and admitted by the answer (R. 31, Pars. I, II) that the "Conditional Sales Agreement", "Lease", and "Grazing Permit", were each an integral part of the whole transaction, neither being acceptable to the plaintiffs without the others.

Appellants agree with the statement made in appellants' brief (page 34) as follows:

> "They were actually purchasing a going business which had been in existence for years, a large number of items of personal property in addition to the cattle, together with a lease on an extensive tract of land, and there is not even an intimation that any of these other items were not lawful items of commerce."

It being conceded by the pleadings that the contract was entire, and that all three contracts constituted one transaction; and the undisputed evidence showing that at the time of the sale, a majority of the cows were infected with Bang's Disease, and that the value of the cows accounted for the greater part of the sale price, a simple question is presented to the Court for solution, to-wit:

> "Were the promises and considerations severable, so that the purchases must retain that portion of the consideration which consisted of legitimate and lawful items of commerce?"

Appellants contend that they must, and in support of their contentions rely solely on the Puerto Rico case, *Hermanos v. Matos,* 81 Fed. (2d) page 930, which, as stated in appellants' brief (page 34) involved the purchase of 122 head of dairy cattle for the sum of $18,000.00. There were no other items in the sale, and no companion contracts. Some of the cattle turned out to be tubercular, and the Court seems to have held that the cattle were sold individually, that it was a distributive sale, and that the defendant had a clear right to insist that the contract was good for the cattle that were sound.

But here we have a situation where, as so earnestly contended by appellants, the sale was of:

> "The whole of that certain dairy and milk distribution business * * * including the livestock, furniture and fixtures, farming implements and tools and motive equipment * * * and also good will;"

and where the purchase price was $28,294.00, of which $16,800.00 was accounted for by the item of 56 cows; that at the time of the sale, according to Territorial Veterinarian Graves, 29 of the cattle had Bang's Disease; according to the same witness, on January 18, 1942, all were infected except 8.

Entire and severable contracts are well defined in the note to Stearns Salt & Laneter Company, 2 *A.L.R.* p. 245, as follows:

> "The construction of contracts of this character does not depend solely or necessarily upon the nature of the articles which are the subject-matter thereof, or upon the price affixed to each article, but rather upon the nature of the contract itself. The contract is entire *if it is one bargain,* and it matters not whether there is one article, or many, each having an apportioned price."
>
> "On the other hand, a severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts in respect to the matters and things contemplated and embraced by it, not necessarily dependent upon each other, the consideration not being single or entire as to all of its several provisions, as a whole."

And further, page 647, as an example of an entire contract, the note states:

> "or when the subject is of such a nature that the failure to obtain a part of the articles would materially affect the object or purpose of the contract, and thus having influenced the sale, had such a failure been anticipated."—citing
>
> *Pacific Timber Co. v. Iowa Windmill & Pump Co.,* 112 N.W. 771.

Further argument seems unnecessary to show that the conditional sales agreement entered into by the parties falls squarely within the foregoing definition of an entire contract. That being the case, the general rule as to the legality becomes applicable.

> "If any part of a single consideration for one or more promises is illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void."
>
> 13 *C. J.*, Sec. 471.

And

> "When an entire contract is illegal in part, a recovery cannot be had thereon by a renunciation of the illegal part,"
>
> "If any part of an indivisible promise or any part of an indivisible consideration is illegal, the whole is void."
>
> *East Stroudberg Nat. Bank v. Seiple,* 13 Pa. Dist. 575, 29 Pa. Co. 245.
>
> "If any part, however small, of the entire consideration of a contract is illegal, the whole is void."
>
> *Kimbrough v. Lane,* 11 Bush (Ky.) 556;
>
> *Wegner v. Biering,* 65 Tex. 506.

Here we have a situation where the larger part of the chief item of a sale consisted of diseased cows, the sale of which was illegal by statute. And it must be remembered that the contract was a conditional sale, that one of the conditions was

> "that the herd shall be maintained in not less than the present number, during the life of this contract",

a condition impossible of fulfilment, as it would require the commingling of healthy with diseased cows, or the purchase of an entire herd, preceded by a careful disinfection of the ranch premises, and the land covered by the lease and grazing permit.

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**RESCISSION.**

It is contended by appellants that the complaint does not state a cause of action, and that there was a failure of proof, because there was neither allegation nor evidence that the appellees offered to return the consideration, the property purchased, and appellants assume, without citing authorities, that such offer of restitution was necessary, even where the contract was illegal, fraudulent and void. We find, however, that the rule as stated in 13 *C. J.*, Sec. 454, is otherwise,

> "While there are cases to the effect that, as long as a party retains the benefit of an agreement he will not be allowed to avail himself of its illegality, they are contra to the weight of authority and are opposed to the general rule already stated, it being ordinarily held that, where the contract is void because of illegality, its repudiation by one party does not give the other a right to have restored to him what he parted with under it."

But it seems unnecessary to consider this assignment. The complaint states a cause of action in damages, regardless of the prayer. No evidence was offered of consequential damage, the testimony being limited to the amounts paid by Sheely. The Court seems to have treated the case as being tried on appellants' affirmative defense, which was a suit for the entire balance alleged to be due under the contract of purchase, and defendants' reply which set up a counterclaim for return of money paid, and prayed for judgment "on plaintiffs' counterclaim for the sum of $18,164.10." (R. 59.)

The situation was exactly as it would have been had the appellants been plaintiffs, elected to terminate the contract and sued for the whole balance of the purchase price. By that said affirmative defense, appellants waive any question of an offer of restitution.

1. They pray for judgment for $16,952.90, on the sales contract;

2. For $2000.00 on the lease, and for possession of the leased premises;

3. For possession of the premises covered by the grazing permit.

They stipulated that their cause of action was of an equitable nature, but would not stipulate that the plaintiffs' cause of action was of an equitable nature. (R. 140.)

They agreed to the trial by the Court without a jury. (Appellants' Brief, page 8; Findings of Fact, R. 64.)

Appellants' conception of equity is that appellees, having paid them the sum of $14,867.95 on the several contracts involved, should now pay them another, $18,952.90, with certain interest, surrender all the premises and personal property involved to appellants, except the remnants of a diseased herd which would still be on appellants' premises, and unsalable by law except for beef.

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### ERRORS IN ADMISSION OF EVIDENCE.

Appellants assign as error the refusal of the Court to permit evidence of the amounts received by appellees from the sale of milk and from the sale of calves. The conditional sales agreement provided (R. 13, Par. VII),

> "that the buyers may dispose of the increase from the dairy herd in such manner as they see fit."

The Court very plainly indicated that the case was tried on appellants' affirmative cause of action for the balance of the purchase price, and appellees' counterclaim for recovery of money paid. The plaintiffs made no claim for consequential damages, which would have rendered necessary an involved accounting, in order to determine loss of profit; what they would have made had the herd been free from disease; their loss by a decrease of milk production on account of such disease; their loss on account of being forbidden by the Territorial Veterinarian, to transport the herd to cheaper pasturage, which was their privilege under paragraph Fourth of the Conditional

Sales Contract, and other elements of damage too numerous to mention.

The plaintiffs having restricted their evidence to the actual money paid, and offering no evidence of consequential damage, the Court very properly refused on Sheely's cross-examination to go into an accounting.

Possibly as stated in appellants' brief, the plaintiff, Sheely, may have made a profit in spite of "war conditions", as stated in appellants' brief (pages 40-41). Yes, possibly Sheely, despite shortage of labor, and handicapped by his Palmer ranch being rendered unavailable by law for feed and grazing, with cows dying and drying up, by his own labor and that of his wife and sons, by routing them all out in the dark hours of the Alaska morning, with the thermometer registering an average 30 degrees below zero, was able to get the cows milked, fed and watered, the barn cleaned out, the milk delivered during the few short hours of daylight, and the evening chores and milking accomplished, and was able to make wages. At any rate he tried to. At any rate, he made his payments of $308.22 per month on the contract, $200.00 per month on the lease, from July up to and including December. He struggled along under these adverse conditions, fulfilling the conditions of his contracts to the end of the year, then gave up. His complaint was verified December 27, 1941. It was not filed until May 13, 1942, possibly because the appellant, Martin, was not in the jurisdiction, but sojourning in the south (which was the fact), enjoying the profits

of a fraudulent transaction. At any rate Sheely, justifiably, made no payments after December, 1941. And Martin, according to the evidence, made no demand for further payments. Never at any time was any demand made by Martin until the filing of his answer on November 2, 1942; not until ten months have elapsed after the alleged default of Sheely, does Martin make any demand for payment, and then only when forced into Court by Sheely.

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**CONCLUSION.**

On page 39 of appellants' brief is the following statement:

> "It is the contention of appellants that far from doing equity, the decision in this case, if it were permitted to stand, would result in about as inequitable a transaction as it is possible to imagine."

This in the face of the trial Court's findings of fact and conclusions of law, based on overwhelming evidence, to the effect that the contract was entire, illegal, against public policy and prohibited by statute; that the parties were not *in pari delicto.*

The decision awards Sheely as little as he could possibly recover under any theory of the case. As stated in appellants' brief, he was an experienced dairy man. He embarked upon an enterprise involving a large initial investment, $9800.00, and very substantial payments, contracting to pay not only a balance of $18,494.00 and interest under the condi-

tional sales agreement, but also $2400.00 per year for ten years on the lease, and $110.00 per year for ten years for the grazing permit; also $2000.00 for hay and $1700.00 for a truck; in all, a consideration of $57,094.00 and interest.

An enterprise involving this very substantial investment, and which contemplated the further investment of ten years' time of the plaintiffs' lives and labor, the investment of the plaintiff Sheely's years of experience and consequent ability and knowledge, and their application to the conduct of the enterprise. With all this investment, the plaintiffs had a right to hope, at least, for a substantial return, to retire at the end of ten years with at least a competence.

It is impossible to estimate, much less prove, the actual damage, immediate and prospective, plaintiffs have suffered by reason of defendants' wrong.

We have asked nothing for diminished profits to the date of suit, nothing for probable future losses, nor shattered hopes and prospects; for not a dollar in excess of what was actually paid. The Court has deducted from this amount every credit which could possibly be allowed to appellants.

The appellants complain that plaintiffs were allowed to amend their complaint by adding to the title the words, "Co-partners" and other allegations to conform to the proposed change. These amendments did not change the cause of action, could not possibly have in any way taken defendants by surprise, to their prejudice, they asked for no time to meet a new issue.

They complain that the complaint was amended in other particulars than those above mentioned, yet can only cite the addition of "$15,000" to the word "damages". They infer that they were hurried into the trial before the amended complaint was filed, yet did not ask for any postponement, but asked that their answer "go to the amended complaint". The trial proceeded without any objection whatever.

Appellants also complain that the Court dismissed the jury, and assigned such action as error, yet consented to such action. (Appellants' Brief, page 8; Findings of Fact, R. 64.)

We submit that judgment should not be disturbed.

Dated, Anchorage, Alaska,
August 2, 1944.

WARREN N. CUDDY,
GEORGE B. GRIGSBY,
*Attorneys for Appellees.*